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No. 94-45

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL LAWSON and DAVID CRIST,

Petitioners,

—v.—

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' question number 2 is more accurately stated as: Did the court below err in finding that the state has an interest in protecting the privacy of the home sufficient to justify an injunction regulating residential picketing? Any question regarding the "inherent authority" of the New Jersey courts of equity is a matter of state law.

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STATEMENT OF THE CASE

Respondents Elrick and Belinda Murray reside in a quiet residential neighborhood in Westfield, New Jersey with their three children, who in 1991 were ages 6, 11 and 15. Elrick Murray is an obstetrician/gynecologist with a private practice in Plainfield, and serves as Medical Director at the Women's Medical Center in Howell, New Jersey, a facility approximately 60 miles from his home. He has no office in his residence and sees no patients there. Dr. Murray performs abortions at the Howell facility. Petitioners' Appendix (PA) at 2a.

Petitioner Lawson resides in Freehold, New Jersey, a community in the same county as the Howell facility, and had picketed at that clinic from at least two years prior to the events in this case. Lawson first appeared at the Murray residence on December 14, 1990, when he rang the bell and told the Murray's 14 year old son to tell his father to stop doing abortions. Mrs. Murray told him to leave and not return. PA at 3a.

On January 20, 1991, Petitioner Lawson and approximately 56 other demonstrators picketed in front of the Murray residence. They walked generally two abreast but sometimes four or five abreast. They formed a loop that centered on the Murray residence. PA at 3a. Although the picketers also marched in front of the homes of several neighbors, the Murray home was never free from picketers during the protest. Dr. Murray remained at his home throughout the picketing but his wife and children, upon the recommendation of the Westfield Police, who had been notified that the picketing would take place, did not remain at their home on that Sunday. The family was thus deprived of its usual Sunday family time together. Dr. Murray was forced to manage patients in labor via telephone, since he was afraid to leave his home. Subsequent to the picketing, Mrs. Murray became anxious and depressed; Dr. Murray curtailed many of his professional obligations for fear of leaving his home unattended. PA at 32a.

Respondents filed suit seeking a temporary restraining order and a permanent injunction. A temporary restraining order was

entered by Judge Boyle on February 22, 1991 permitting picketing of one hour every third week by no more than two demonstrators. Petitioners, however, violated the spirit of the order by bringing in extra persons and parking a van in front of the Murray residence with a large sign spanning the length of the vehicle.[1] Respondents' Appendix (RA) at 2a-5a.

Testimony on this matter was heard on February 8, February 14, May 21 and May 31, 1991. Throughout the hearing, testimony was elicited regarding the layout of the Murray neighborhood and the trial judge made very specific observations on that subject. Judge Boyle personally visited the street where the Murrays reside and noted "I drove down the street, the 900 block, and I think Dr. Murray's house is 917. I looked at his house from the outside and I looked at the houses on the block, on both sides of the street." He further noted that, based on his observations, the neighborhood was "purely residential." February 14, 1991. RA at 1a.

In his final ruling, Judge Boyle consulted the tax map of Westfield and set forth the specific dimensions and character of respondents' neighborhood. "Their home is a one-family dwelling, set back approximately 25 feet from the public sidewalk. It is located on a block approximately 600 yards long, 33 yards wide. PA at 51a-52a. The trial judge went on:

> I note that Dr. Murray's house is on block 643 on lot 12, that he faces on Carlton Road, a distance which I have previously indicated. That street is bounded by the intersection on the west by Grove Street, on the east by Clifton Street....Carlton Road itself is a completely residential street on both sides, so is Grove Street, so is Clifton Street.

Id. at 65a-66a.

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[1]The sign said "Women with unplanned pregnancies deserve love and support, not a dead baby." RA at 5a.

The particular neighborhood, together with the specific conduct of the picketers both before and after issuance of the temporary restraining order, convinced the trial judge that a 300-foot restriction against picketing was necessary to protect the Murray's residential privacy and he entered a permanent injunction to that affect on July 25, 1991.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' assertions, the New Jersey Supreme Court's decision does not conflict with decisions of this Court, including its decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Most of petitioners' arguments were rejected in *Madsen*. Although *Madsen* announced a slightly altered standard for evaluating the constitutionality of injunctions affecting picketing, the injunction at issue in this case meets that standard. The writ, therefore, should be denied.

If the Court decides to grant the writ, this case does not merit plenary review. At most, this Court should remand the case to the Supreme Court of New Jersey for reconsideration in light of *Madsen*.

I. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT A PRIOR RESTRAINT.

Petitioners argue that the state court erred in not reviewing the injunction at issue in this case under the strict standards applicable to "prior restraints." This Court's decision in *Madsen*, however, categorically rejected this argument.

In reviewing the propriety of an injunction creating a 36-foot no-picketing "buffer zone" around a Florida abortion clinic, this Court said the injunction was not a prior restraint for two reasons, both of which apply here. First, the "petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot

buffer zone." *Madsen*, 114 S. Ct. at 2524 n. 2. Similarly, here, petitioners are not prevented from expressing their message outside the 300 foot no-picketing zone that surrounds respondents' residence. Moreover, even within that zone, they are free to engage in non-picketing activities such as leafletting and door-to-door canvassing.

Second, this Court said in *Madsen* that "the injunction was not issued because of the content of petitioners' expression. . . but because of their prior unlawful conduct." *Id.* The same analysis applies here. The New Jersey Chancery Court issued the injunction, not to quash respondents' message, but to prevent repetition of conduct that violates significant governmental interests in protecting residential privacy. PA at 19a.

The doctrine of prior restraints is inapplicable here.

II. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT CONTENT-BASED.

Petitioners allege further that the New Jersey Supreme Court erred in not applying the strict standards applicable to a "content-based" restriction on speech in a public forum. This Court rejected this argument in *Madsen* as well.

The fact that an injunction covers only people with a certain viewpoint does not render it content- or viewpoint-based, this Court said. *Madsen*, 114 S. Ct. at 2523. The principal inquiry in determining content neutrality is whether the governmental regulation is adopted "without reference to the content of the regulated speech." *Id.* (citing *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)). In *Madsen*, the injunctive order was adopted without reference to content because it was adopted to cure abuses of a previous order aimed at protecting access to an abortion clinic. Only those with an anti-abortion view were covered by the injunction because only persons with those views had engaged in those demonstrations.

The New Jersey Supreme Court adopted the identical analysis in this case. "Only these defendants interfered with plaintiffs' residential privacy. Accordingly, the Chancery Division restrained only the activities of only these defendants." PA at 14a. Moreover, as in *Madsen* there is "no evidence that [New Jersey] law would not equally restrain similar conduct directed at a target having nothing to do with abortion." 114 S. Ct. at 2523. Accordingly, the injunction at issue here is not content-based.

III. THE STATE HAS A SIGNIFICANT INTEREST IN REGULATING RESIDENTIAL PICKETING.

Respondents argue that the New Jersey Supreme Court erred in holding that a chancery judge may enjoin residential picketing upon a finding of an "intimidating effect" of the picketing on the occupants of the home. The state court made no such holding. Rather, the New Jersey Supreme Court held that the state has a significant interest in protecting residential privacy and that this interest justifies injunctive relief in favor of the picketed residents. PA 16a-19a. This is exactly what this Court held in *Frisby v. Schultz*, 487 U.S. 474, 477 (1988), and affirmed in *Madsen*, 114 S. Ct. at 2529-30.

Ironically, a holding that a court must find an intimidating effect in order to enjoin residential picketing would give petitioners more protection than is available under this Court's decisions. Under *Frisby* and *Madsen* the state has the power to regulate residential picketing without any showing of actual intimidating effect upon the residents.

IV. THE INJUNCTION AT ISSUE IN THIS CASE CONFORMS TO THE STANDARD SET BY THIS COURT IN *MADSEN*.

Petitioners argue that the ruling below is in direct conflict with this Court's decision in *Madsen*, because the New Jersey Supreme Court upheld a 300-foot no-picketing buffer zone around

respondents' residence and this Court struck down a 300-foot zone in *Madsen*. *Madsen*, however, did not rule all 300-foot buffer zones unconstitutional. Rather, the Court ruled that the *Madsen* record did not justify the spatial scope of the no-picketing zone in that case. In contrast, the buffer zone at issue here is justified by the record.

In *Madsen* this Court reviewed an injunction that threw up a series of 300 foot buffer zones around residences of all the staff members of a Florida abortion clinic. These residences ranged from homes in residential neighborhoods to temporary quarters in hotels. No specific findings were made by the lower court to justify the spatial scope of the 300 foot zones. In fact, there was no finding that picketing had taken place at every one of the locations protected by a buffer zone. Accordingly, this Court found that "the record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Madsen*, 114 S. Ct. at 2530.

In contrast, the trial judge in this case made specific factual findings regarding the Murray residence that justify the spatial scope of the injunction. He consulted the tax map of the town of Westfield and even visited the street where respondents' home is located, drove through the neighborhood and noted the frontage of the various properties and the layout of surrounding streets. PA at 51a-52a, 65a-66a, RA at 1a.

The resulting order burdens "no more speech than necessary" to protect residential privacy. *Madsen*, 114 S. Ct. at 2525. First, the order does not, as petitioners' assert, create a "speech free," "no entry" zone around respondents' residence. It bans only one activity, picketing. PA at 69a. Petitioners are free to enter the 300-foot buffer zone and pass out leaflets and communicate with respondents' neighbors by other means than picketing.

Second, the order did not ban respondents from walking an entire block of houses or an entire neighborhood, as this Court was

concerned the *Madsen* injunction would do. Respondents live on a block 1800 feet long. PA at 52a. The injunction kept petitioners from only one-third its length. Petitioners were free, therefore, to communicate their message to respondents' neighbors without the intimidating effects of focussed picketing centered on respondents' residence. Moreover, the rest of the entire suburban town of Westfield was open for picketing. PA at 67a. In contrast, the multiple buffer zones surrounding the temporary and permanent residences of all staff in *Madsen* could, indeed, have blocked out entire neighborhoods.

Third, the trial judge was careful to note that the 300 foot buffer zone surrounding the respondents' residence was entirely residential in character. Respondents were therefore not banned from picketing in any arguably commercial street where the state's interests in residential privacy would be irrelevant. No such findings were made by the lower Court in *Madsen*.

Finally, the permanent injunction was issued after a more limited injunction proved ineffective. The previous injunction had limited the number of picketers and the duration of picketing, as this Court suggested in *Madsen*. Petitioners, however, violated the spirit of that order by bringing in extra persons and using a large vehicle to create an intimidating presence.[2] RA at 2a-5a. The final order was more liberal in allowing petitioners to bring in as many persons and vehicles as they chose, whenever they chose (consistent with town ordinances on obstructing traffic and excessive noise), but requiring the demonstrators to allow respondents some breathing space for their private lives.[3]

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[2]The trial court's concern with petitioners' violation of the spirit of the temporary restraining order is reflected in its opinion that the permanent injunction should cover picketing "either by vehicle as opposed to pedestrian." PA at 67a and 69a.

[3]In contrast, the *Madsen* injunction on residential picketing, was not issued after circumvention of a prior order.

On appeal, the New Jersey Supreme Court carefully reviewed the spatial scope of the injunction to determine if it was warranted by the record. PA at 23a. Although it did not have the benefit of this Court's ruling in *Madsen* that an injunction should burden "no more speech than necessary," it did in fact examine the injunction to determine if it burdened "substantially more speech than is necessary to further government's legitimate interests." PA at 20a-21a. It concluded that the injunction did not.

In reviewing the buffer zone around the abortion clinic in *Madsen*, this Court noted that even though, "[t]he need for a complete buffer zone near the clinic. . . may be debatable, . . . some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review," 114 S. Ct. at 2527, and that the "failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order." *Id.* The same deference should be given to the lower court's findings of the necessity of the 300-foot residential buffer zone here. This Court "do[es] not grant a *certiorari* to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (citations omitted).

Accordingly, the petition should be denied.

V. IF THIS COURT GRANTS THE PETITION, IT SHOULD NOT GRANT PLENARY REVIEW, BUT REMAND FOR RECONSIDERATION IN LIGHT OF *MADSEN*.

If this Court is inclined to grant *certiorari*, it should not grant plenary review, or summarily reverse, but remand this case to the New Jersey Supreme Court to consider the continued propriety of the injunction in light of *Madsen*. This mode of disposition is appropriate when "the intervening decision has shed new light on the law which, if it had been available at the time of the [lower court's] decision, might have led to a different result." *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978). (Stevens dissenting). Although *Madsen* does not require a different result in this case,

if this is in doubt, the state court, as the court most familiar with the facts, should have the opportunity to make this decision in the first instance.

CONCLUSION

The petition for certiorari should be denied. If the petition is granted, however, this case should not be set down for plenary review, but should be remanded for reconsideration in light of *Madsen*.

Respectfully submitted,

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APPENDICES

EXCERPTS FROM TRANSCRIPT OF HEARING ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, FEBRUARY 14, 1991

[21] THE COURT: No, since Friday I took a ride down the street. I was trying to refresh my recollection as to the neighborhood. So I want to place on the record the fact that I drove down the street, the 900 block, and I think Dr. Murray's house is 917. I looked at his house from the outside and I looked at the houses on the block, on both sides of the street.

Interesting enough, if I recall correctly, there isn't a sidewalk on both sides of the street for its full length. I was surprised at that because it's a fairly built-up neighborhood. There's no vacant lots, it's not rural, it's strictly a suburban town, all improvements, improved street, curb, mostly sidewalks, but not entirely. It appears to me every lot has a one-family house on it. I didn't measure the lot sizes but it appears to me the lot sizes run anywhere from 65 to 70 feet in frontage in that area. It's purely residential. And it isn't even close to commercial area. By close I mean there's no commercial behind it or on either end of the block. It's purely residential.

EXCERPTS FROM TRANSCRIPT OF HEARING ON PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION MAY 31, 1991

[49] Ms. Mandel: You stated that you returned to the Murray house on May 25th. Is that correct?

Mr. Lawson: May 25th?

Q. Yes, last Saturday?

A. Okay.

Q. Is that right?

A. That's right.

Q. Okay. And you, did you drive there yourself?

A. No.

Q. Who did you bring with you?

A. Well, Silvia Potter drove me.

Q. So she was there?

A. Yes.

* * *

Q. What did she do there?

A. She was a witness. She sat in her car.

Q. And where was her car parked?

[50] A. Couple of houses down from Murray's.

Q. What kind of car does she have?

A. Late model, blue.

Q. And who else came there that day?

A. Edith Tucker.

Q. She is the woman who picketed on the 4th, isn't that correct?

A. Yes.

Q. Did she take pictures?

A. Yes.

Q. But she didn't picket, is that correct?

A. No. That is correct.

Q. Where did she stand taking pictures?

A. Across the street.

Q. Is that where she parked her car?

A. No, she didn't have her car.

Q. Who did she come with?

A. Silvia Potter.

Q. So the three of you came together?

A. Yes.

Q. Okay. We are getting somewhere. So three of you came together; one was a witness, one as a picture taker, and you were the picketer?

A. Yes.

Q. Did someone else come on May 25th?

[51] A. That is correct.

Q. And what is his name?

A. Bill Dregi.

Q. What did he come in?

A. His own car.

Q. Did he come in a van?

A. No.

Q. Did someone come in a van?

A. Yes.

Q. Who was that?

A. Bill Kohler.

* * *

Q. And the van was parked in front of Dr. Murray's [52] house, wasn't' it?

A. That is correct.

Q. And it had a huge sign on it, didn't it?

A. Yes.

Q. Length of the van, didn't it?

A. Yes.

* * *

[60] Ms. Mandel: On May 25th you were at your house when the picketers came?

Dr. Murray: Yes.

Ms. Mandel: Did you see the van that was in the picture?

Dr. Murray: Yes.

Ms. Mandel: What did the sign say?

Dr. Murray: It said, Women with unplanned pregnancies deserve love and support, not a dead baby.

* * *